There will, therefore, be judgment for the plaintiff for six hundred dollars and costs.

Judgment accordingly.

[APPELLATE CIVIL JURISDICTION]
THOMAS, C.J.
OCTOBER 5, 1934.

CHONG KWONG.....Appellant.

v.

PUBLIC PROSECUTOR.....Respondent.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 24 of 1934.]

The Opium and Chandu Enactment, 1931, section 15, sub-section (1) (e)—Sale of adulterated chandu dross to a superintendent—Mens rea.

The Opium and Chandu Enactment, 1931, section 15, sub-section (i) (e) makes it an offence for any person to offer for sale to a Superintendent adulterated Chandu dross. The appellant collected Chandu dross from his coolies and sold it to a Superintendent. On analysis this chandu dross was found to be adulterated, but the appellant was unaware of such adulteration.

Held, that the prohibition on the sale of adulterated chandu dross is absolute, and that knowledge of such adulteration by the person selling the dross is not necessary to constitute the offence.

Mark Morrison for the appellant. The presumption is that "mens rea" is a necessary element in every criminal offence—*Chisholm* v. *Doulton*, 22 Q.B.D. 726 and *Paul* v. *Hargreaves*, (1908) 2 K.B. 289.

When words like "knowingly" or "wilfully" are imported into a section the burden of proof is on the prosecution to prove the state of mind of the accused. Fact that such words are not imported into the section does not prevent the accused from proving absence of "mens rea."

There is a class of cases in which the legislature intends total prohibition, but to prevent presumption of "mens rea" there must be some indication in the Enactment itself or in the subject-matter thereof from which it can be clearly inferred that legislature intends total prohibition—e.g. Public Health Acts, Food Acts, etc.

Opium and Chandu Enactment is a trading venture of the Government and does not deal with public health. No indication in the Enactment that legislature intended total prohibition. If such was intended then under section 15, sub-section (i) (c) an innocent bailee of chandu dross exceeding 5 tahils in weight would be punishable with a fine of twenty times the value of the dross in excess of 5 tahils and Magistrate has no discretion.

H. C. Willan, Deputy Public Prosecutor, for the respondent. The legislature has intended that there should be absolute prohibition on the sale of adulterated chandu dross. Decided cases show that it is necessary to look at the object of an Enactment to see whether and how far knowledge is of the essence of the offence created. The provisions of section 15 of the Opium and Chandu Enactment amount to a total prohibition; otherwise the proviso to that section is redundant. Provisions similar to that proviso in respect of chandu and chandu dross are to be found in section 9, sub-section (b) and section 13, sub-section (iii).

Cur. Ad. Vult.

THOMAS. C.J.—The appellant was convicted by the learned Magistrate of Kuala Lumpur of selling adulterated chandu dross contrary to section 15(i)(e) of Enactment No. 5 of 1931, and sentenced to pay a fine of $5.

The facts briefly are that the appellant collected from various of his fellow workers who are opium smokers, their chandu dross. This together with his own he offered for sale to a superintendent. On the receipt of such a parcel from private vendors it is weighed and then passed to a customs cooly who wraps it up separately. This is all done in the presence of the vendor, and a temporary receipt is issued. A parcel was so received from the appellant on the 19th of June, 1934. All parcels are liable to analysis, and vendors are aware of this condition. Payments are made a fortnight after receipt of the parcels.

The appellant's parcel was in fact analysed, and was found to contain 2.30 tahils of second quality chandu dross of which 3.2 per cent. was amang. A distinction is drawn between first class and second class chandu dross. The following appears in the evidence:—

> "Maximum gain 52 cents supposing dross 1st class and amang worth nothing. If 2nd class dross 10 cents. Most dross 1st class."

The appellant explained that he was an opium smoker himself, and collected opium dross from his friends. Any payment in receipt thereof he would take for himself, and would not distribute any part of it amongst his friends, nor did he pay his friends for the opium dross received from them.

The learned Magistrate found that the adulteration was intentional, but was prepared to give the appellant the benefit of the doubt as to his knowledge of the adulteration, because he seemed to be a respectable man who would be unlikely to indulge in so comparatively unremunerative a fraud. In other words the learned Magistrate found that the appellant had no 'mens rea' or guilty mind when offering the chandu dross for sale.

It has been urged on this appeal that a 'mens rea' is an essential ingredient to an offence, and when such is lacking then an accused person cannot be convicted. That statement is rather too wide, since, in every case the language of the Enactment must be considered.

Thus it is frequently found that the words 'knowingly' or 'with intent' are introduced. In such cases it is for the prosecution to prove the

knowledge or intent. When such words are not present, the burden is cast upon the defence to prove that there was no *mens rea* or guilty mind.

There is, however, a class of offence in which the prohibition is so emphatic that even the absence of *mens rea* is no defence. In these offences it is immaterial what was the state of mind of the accused, the offence has been committed whether he has knowledge or not.

A good example of such a class of case is demonstrated in *Cundy* v. *Le Cocq*, 13 Q.B.D. 210. In that case a publican had sold intoxicating liquor to a drunken person who had given no indication of intoxication, and without being aware that the person so served was drunk. Stephen, J. said in his judgment:—

> "Our answer to the question put to us turns upon this, whether the words of the section under which the conviction took place, taken in connection with the general scheme of the Act, should be read as constituting an offence only when the licensed person knows or has means of knowing that the person served with intoxicating liquor is drunk, or whether the offence is complete where no such knowledge is shown. I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a *bona fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed."

This decision has been followed in many other cases. See *R.* v. *Bishop*, 5 Q.B.D. 259.

Mr. Morrison for the appellant cited the cases of *Paul* v. *Hargreaves*, (1908) 2 K.B. 289 and *Chisholm* v. *Doulton*, 22 Q.B.D. 726. In the former case the punitive section reads as follows:

> "If it appears to a Court of summary jurisdiction that any load, sack or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds."

The words 'person in charge of the vehicle' were held to refer to a seller or a person making a representation as a seller. Therefore it was open to a person to show that he was a mere deliverer.

The case does not in my opinion so much turn on the question of *mens rea* as on whether the person accused came within the category of the persons capable of committing the offence. It was not shown that he was a seller, and a mere deliverer is not necessarily a seller.

The second case related to an offence under the Smoke Nuisance (Metropolis) Act, 1858. As Field, J. pointed out, the mere use of a furnace so as to emit smoke is not an offence against the section, the offence is the using of it negligently. Cave, J. considers that the word 'negligently' imputed a blameable condition of the mind. He goes on to say:—

> "as I know no statute has ever yet been judicially interpreted as enacting that where negligence is an essential ingredient in the offence, a master is to be responsible for the negligence of his servant."

Now turning to section 15 of Enactment No. 5 of 1931 the section commences 'No person shall', and after the enumeration of four acts which are thus prohibited, adds a fifth viz: (e) offer for sale to a superintendent adulterated chandu dross.

It was suggested that the appellant was a mere deliverer of the chandu dross. But that statement is not borne out by the evidence given by the appellant at the trial. He said that he would take all the payment for dross himself. He would not distribute it amongst friends. He was in fact the seller and in fact offered the chandu dross. Therefore he does not come within the terms of the first case cited by his advocate. There is no question of negligence in this case.

I am satisfied that the plain meaning of the words of the Enactment is that certain acts are absolutely prohibited. It is not a question of the state of the mind of the accused. Whatever his state of mind may have been it does not prevent the offence being committed.

There is good reason for such absolute prohibition. The question of opium consumption has been the subject of many conferences. Stringent regulations have been approved for the suppression and control of the use of opium in its various forms. The object is for the protection of the public and the uses of such drugs. It is well-known that chandu dross obtained from smoked chandu can be used a second and even a third time, but such use is likely to affect the health of the consumer injuriously. To avoid this the Government arranges to purchase chandu dross, not with a view to making a gain or profit but only for its destruction. This is an expense incurred in the interests of the public; it is only right that the Government should be given the utmost protection in such transactions.

Therefore, not only is the language of the section absolutely prohibitive, but there is the strongest reason for such prohibitive language.

The degree of punishment is left to the discretion of the Magistrate, and depends on the circumstances of each case. In this case the learned Magistrate has rightly taken into consideration the possibility of there being an absence of guilty intention on the part of the accused, and has inflicted the almost nominal fine of five dollars.

In my opinion for the reasons I have given above, this appeal should be dismissed. The conviction and sentence are confirmed.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]
BURTON, J.
December 4, 1934.

LOW CHOONG .....
KOH CHOON ..... } Plaintiffs

v.

LIM SAN .....
KANG SAY KHOO ..... } Defendants.

[SELANGOR CIVIL SUIT No. 408 of 1933]

The Contract Enactment, 1899, section 218 —Agency—Accounts—Illegal contract—Lottery.

The Lam Chian Kiang temple in Kuala Lumpur raised money by means of a public lottery. For the purposes of managing the lottery the Committee appointed as Treasurer and Assistant Treasurer, the first and second defendants respectively.

The plaintiffs representing the Committee of the Management of the temple, claimed a true and proper account of the moneys received by the defendants in respect of this lottery.

Held, that the defendants were employed solely for an unlawful purpose, to wit—the organisation of a public lottery, and that since the foundation of the action was an account of the moneys received for an illegal purpose on the part of both the plaintiffs and defendants, the claim must be dismissed.

S. M. Sharma for the plaintiffs.

A. J. Bostock-Hill for the defendants.

Cur. Ad. Vult.

BURTON, J.—During the slump of 1932 the Lam Chian Kiang temple in Kuala Lumpur ran short of funds, and at a meeting of the committee it was decided to attempt to supply funds by holding a lottery. There can be no question that the lottery was held and that it was a public lottery. As a result of the lottery $1,182.87 was paid to the Treasurer of the temple.

For the purpose of managing the lottery Yap Seng Chor was elected President; Lim San, the first defendant, Treasurer and Kang Sey Khoo, the second defendant, Assistant Treasurer.

The plaintiffs, who represent the Committee of Management of the temple, complain that the defendants have not submitted true and proper accounts of the monies received in the lottery.

The defendants claim:—

(a) That they have submitted accounts.

(b) That in law they are not liable to account.

On the facts I have come to the conclusion that they have not submitted accounts. The defendant showed a book of accounts which was also exhibited to the defence. This shows that $1.182.87 has been paid to the Treasurer, and it also contains the signature of Yap Seng Chor who was also the President of the Temple. But it is not clear that Yap Seng Chor's signature was affixed as President of the temple, and I do not think that if it was, it would be sufficient quittance. The plaintiffs think that there ought to have been a larger sum paid to the temple, and I think *prima facie* they would be entitled to have the accounts examined. There is no evidence that anything but the book of accounts was shown to them, and I take it that anyhow the plaintiffs might be entitled to more than that. They would have for instance a right to examine the butts of the lottery tickets sold and the unsold books, and to examine the account of the payment of the prizes.

There can be no doubt that the lottery was held as a result of a decision of the Committee of the temple, and that Yap Seng Chor and the defendant were only carrying out the instructions of the body which the plaintiffs represent. The defendants, therefore, say that the agreement to hold the lottery being illegal cannot be enforced.

The case has been put by both counsel on the footing of agency. Yap Seng Chor and the defendants were the agents of the Committee of the temple. We are, therefore, governed by section 218 of the Contract Enactment—

> "Subject to such deductions, the agent is bound to pay to his principal all sums received on his account."

The sole question in this suit is whether or not this case affords an exception to the apparent universality of this provision. I am of opinion that it does.

I cannot see that the case of *Lim Lian Wah* v. *Lee Ah Kiew*, 7 F.M.S.L.R. 66 has any bearing on the present problem. The lottery in that case was found to be not a public lottery, and the agent received the prize money on behalf of the principal, though the agency was not disclosed to the organisers of the lottery. There was, therefore, nothing unlawful as between Lim Lian Wah and her agent; and the agent having recovered the money on her behalf was ordered to pay it over to her. I think that the statement of the facts in this case by using the word 'illegal' is possibly misleading. The agent received the money under a void contract and was ordered to pay as a trustee of the money so received.

But here we have quite a different case. The lottery was a public lottery and the holding of it was a criminal offence. The defendants were employed simply and solely to organise this lottery, and their appointment was for this unlawful purpose only. I am of opinion that the maxim *ex turpi causa non oritur actio* applies. The principle applied in *Nicholson* v. *Gooch*, 119 E.R. 752 at page 759 must govern our case, and this case serves to distinguish *Tenant* v. *Elliott*, 1 B. & P. 3, and similar cases which were relied